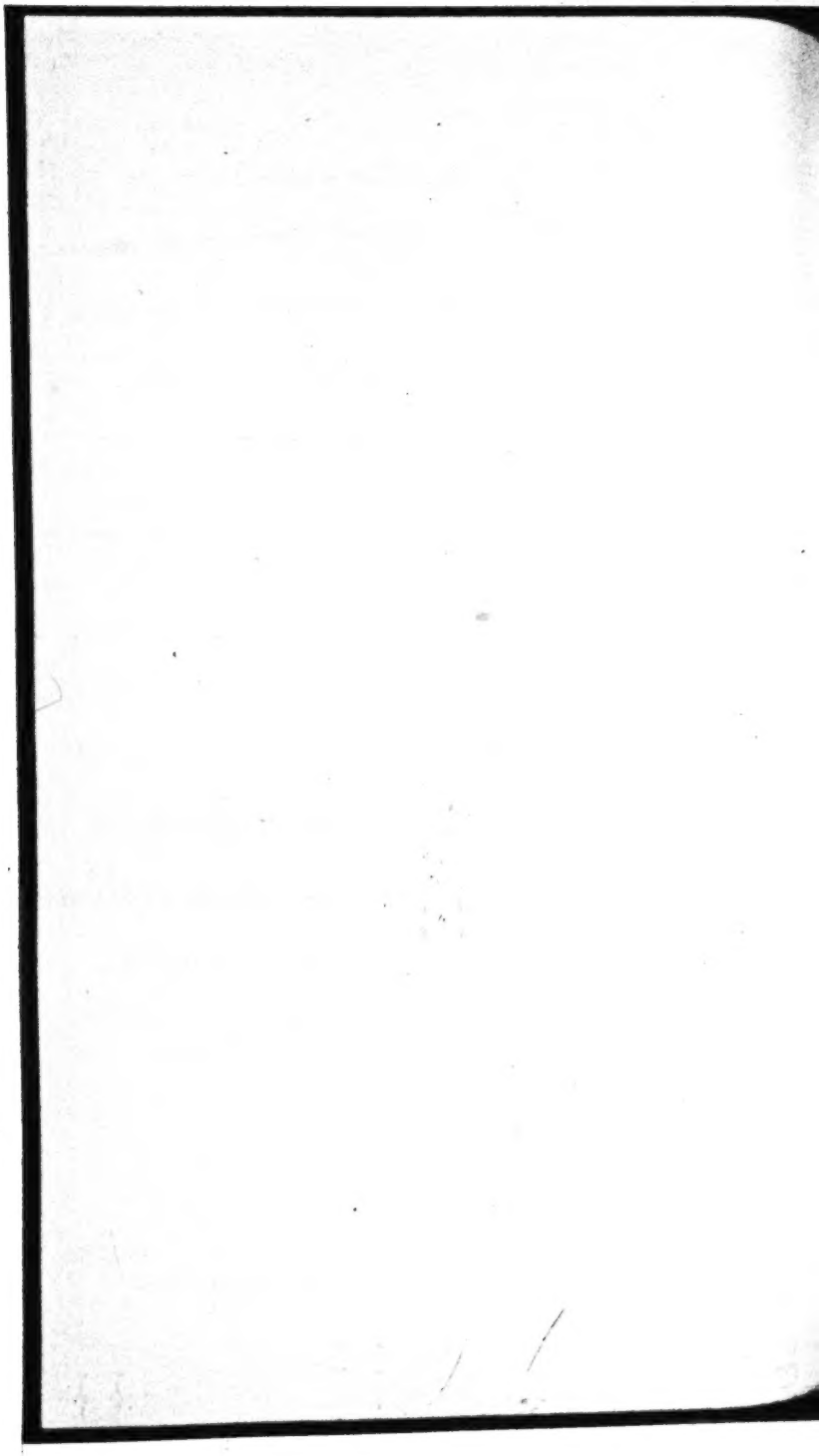


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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

ROSALIND McCLANAHAN, on behalf of herself and all others similarly situated,

Appellant,

vs.

ARIZONA STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

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BRIEF OF MONTANA INTER-TRIBAL POLICY BOARD AS *AMICUS CURIAE*

The Montana Inter-Tribal Policy Board, as *amicus curiae,* submits this brief on behalf of all Montana Indians. Appellant and Appellee have each given written consent to the filing of this brief, which consents have been filed with the Clerk of the Court.

Interest of *Amicus Curiae*

The Montana Inter-Tribal Policy Board represents approximately 27,000 Indians living in the State of Montana. About 20,000 Indians live on or near the seven Montana Indian reservations which contain the following Indian Tribes: Arapahoe, Assiniboine, Blackfeet, Chippewa, Cree,

Crow, Flathead, Gros Ventre, Northern Cheyenne, and Sioux.

Most of these tribes, like the Navajo Tribe of which Appellant Rosalind McClanahan is a member, have retained their customs, laws, and tribal government, are organized pursuant to the Indian Reorganization Act of 1934,[1] and are currently expanding their governmental functions. These Montana tribes provide their members with governmental administration and services, including: civil and criminal courts; health, education, and welfare programs; and capital improvements. These activities require that the tribes raise substantial revenue from their own limited financial resources and those of their members.

Arizona's assertion that it has power to tax the income of tribal Indians poses a direct threat to the viability of tribal self-government in Montana as well as in Arizona. The Montana Indian tribes have protective treaties with the federal government similar to those of the Navajos.[2] The enabling acts of Arizona and Montana have identical disclaimer provisions leaving Indian lands "under the absolute jurisdiction and control"[3] of the United States. A decision upholding Arizona's tax levy might authorize Montana to tax the income of many of the tribal Indians represented by the Montana Inter-Tribal Policy Board. Such taxation would effectively destroy the residual aboriginal right of these tribes to make and be governed by their own

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[1] 25 U.S.C. § 476.

[2] See *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 52 (1962), which notes the similarity in crucial language of the Navajo Treaty of 1868 (15 Stat. 667) and the Montana Crow's Treaty of 1868 (15 Stat. 649).

[3] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 68 (1962), notes this identical language.

laws, a result that contravenes the applicable treaties with the United States government and acts of Congress.[4]

The States of Montana and Arizona have only minimal responsibility for Indians. With only one minor exception,[5] neither state has the responsibility of civil or criminal jurisdiction over Indians on reservations within their borders. *Amicus Curiae* submits that when a state taxes the income of tribal Indians without assuming, either as a result of Congressional action or a decision by the Indians themselves, corresponding responsibilities for the well being of the tribes, such action is so arbitrary and unfair that it constitutes a violation of the due process rights guaranteed Indians by the Fourteenth Amendment to the United States Constitution.

Summary of Argument

I. State taxation of members of self-governing Indian tribes is precluded by the residual aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty between the Indian tribes and the federal government, has not been relinquished by the Indian tribes, and has not been modified by act of Congress. The right of sovereignty of the Navajo Tribe of which Appellant is a

[4] There are presently two cases pending in Montana challenging the right of the state to collect personal income tax from Indians. One in state court, *Day* v. *State of Montana*, No. 35818 (1st Judicial District, Lewis & Clark County), and one in federal court, *Confederated Salish and Kootenai Tribes* v. *State of Montana*, Civ. No. 2157 (D. Mont.).

[5] The exception is Montana's exercise of criminal and some civil jurisdiction on the Flathead Reservation where some 80 per cent of the residents are non-Indians. See *State ex rel. McDonald* v. *District Court*, —— Mont. ——, 496 P.2d 78 (1972), and *Kennerly* v. *District Court of Montana*, 400 U.S. 423, 425 (1971).

member was guaranteed to it by the Navajo Treaty of 1868 (15 Stat. 667), and has never been relinquished or abandoned by the Tribe. Subsequent Congressional acts have not significantly modified the right to sovereignty guaranteed by this treaty. State taxation of the income of a tribe or its members severely jeopardizes the continued viability of this treaty-guaranteed sovereignty by draining off the meager resources available to finance tribal governmental functions.

II. Due process of the law prevents states from levying taxes upon citizens on behalf of whom it has accepted only minimal government responsibilities.

ARGUMENT

I.

State taxation of members of self-governing Indian tribes is precluded by the aboriginal sovereignty of those tribes where such sovereignty is recognized by treaty, not abandoned by the Indians, and not modified by act of Congress.

A. *Where the Aboriginal Internal Sovereignty Rights of Indian Tribes Are Protected by Treaty With the Federal Government, Such Rights May Be Modified Only by Congressional Act or by Consent of the Indians Themselves.*

As "Native Americans," Indian tribes enjoyed the aboriginal status of completely sovereign nations.[6] They re-

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[6] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832): "The Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights . . . from time immemorial. . . ." See also *Buster* v. *Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

linquished their sovereignty to the federal government only to the extent provided by treaty. The scope of such relinquishment can be expanded only by subsequent act of Congress, or by the Indians' consensual abandonment of such rights. Federal treaties with the Indians recognized and protected the Indians' pre-existing internal tribal sovereignty,[7] and the Indian tribes that became parties to such treaties accordingly assumed the status of dependent, self-governing "nations."[8]

Thus, in the landmark decision of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), Chief Justice Marshall stated of the "Cherokee Nation":

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[7] See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942) (U. New Mexico Press reprint 1971) 122 [hereinafter cited as COHEN]: "Perhaps the most basic principle of all Indian law, supported by a host of decisions hereinafter analyzed, is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" (Emphasis in original).

[8] *Worcester* v. *Georgia*, 31 U.S. at 559-60: "We have applied them [the words "treaty" and "nation"] to Indians, as we have applied them to other nations of the earth; they are applied to all in the same sense . . ." This was also the view of the Court of Appeals as to the Navajos in *Native American Church* v. *Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959): "But as declared in the decisions hereinbefore discussed [*Worcester* v. *Georgia*, *supra*; *United States* v. *Kagama*, 118 U.S. 375 (1886); *Williams* v. *Lee*, 358 U.S. 217 (1959)], Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States." See also, Comment: *Indian Taxation: Underlying Policies and Present Problems*, 59 CALIF. L. REV. 1261, 1264-66 (1971); and COHEN at 33-34: "That Treaties with Indian tribes are of the same dignity as treaties with foreign nations is a view that has been repeatedly confirmed by the federal courts and never successfully challenged."

> The Cherokee nation, then, is a distinct community, occupying its own territory, . . . in which the laws of Georgia can have no force . . .
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> • • • • •
>
> [The Georgia laws asserting jurisdiction over a non-Indian in the Cherokee domain] interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union. They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia; guaranty to them all the land within their boundary; solemnly pledge the faith of the United States to restrain their citizens from trespassing on it; and recognise the pre-existing power of the nation to govern itself.
>
> They are in hostility with the acts of Congress for regulating this intercourse, and giving effect to the treaties.[9]

The importance of this decision is its holding that the original treaty guaranties of tribal Indians' right to be self-governing are absolute—*beyond State control under the Constitution*[10]—unless Congress, by subsequent treaty,

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[9] 31 U.S. at 561-562. The Treaty status of the Cherokee Nation and its relationship to the federal and state governments were held analogous to that of the Navajo Tribes in *Williams* v. *Lee*, 358 U.S. 217, 221-222 (1959).

[10] The Treaty power is contained in U.S. CONST. art. II, § 2, cl. 1. States are forbidden from entering into treaties by U.S. CONST. art. I, § 10, cl. 1. Federal treaties are binding on the states under U.S. CONST. art. VI, cl. 2: ". . . all Treaties made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby . . ."

or statute under its plenary power over Indians,[11] revises these treaty obligations. These treaty rights were reaffirmed in *Williams* v. *Lee*, 358 U.S. 217 (1959), which held that Navajo sovereignty recognized by the Treaty of 1868 was "infringed" by allowing a non-Indian residing on the Reservation to bring suit against a member of the Navajo Tribe in the Arizona civil courts, rather than in the Navajo tribal courts. This Court stated:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester* v. *Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. . . .
> . . . Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them it is for Congress to do it. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564-566.

358 U.S. at 221-23. Accord: *United States* v. *Kagama*, 118 U.S. 375 (1886); *Ex parte Crow Dog*, 109 U.S. 556 (1883); and *Arizona ex rel. Merrill* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969).

A state cannot, therefore, unilaterally assume jurisdiction over a treaty-protected, sovereign Indian tribe, even where the state has extended some measure of rights and privileges to the tribe. Any state statute which conflicts with the federal treaty protection of the residual right to tribal sovereignty is void under the Supremacy Clause. (U.S. Const. art. VI, cl. 2.) State jurisdiction can be ob-

[11] Congress retains plenary power over the Indians under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3: "To regulate commerce . . . with the Indian Tribes." See *Williams* v. *Lee*, 355 U.S. 214, 219 n. 4 (1959).

tained only by alteration of the treaty, by the Indians' abandonment of the right to tribal self-government, or by act of Congress:

> Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and laws of Congress, and their property is withdrawn from operation of State laws.

The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866).

B. *Indian Tribes Who Have Retained Their Tribal Organization and Government Have Not Abrogated Their Aboriginal Sovereignty So as to Permit the Exercise of State Jurisdiction.*

States are totally precluded from jurisdiction over Indians in any area where the Indians have retained their tribal sovereignty. Only where the right to tribal self-government has been abandoned by individual Indians or by a particular tribe and where the state has assumed full responsibility for such Indians may the state exercise jurisdiction over them.[12] Such was the case of the Oklahoma Indians in *Leahy* v. *State Treasurer of Oklahoma*, 297 U.S. 420 (1936), which sustained a state tax on an Indian's share of his tribe's mineral resource income, and in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), which upheld application of the Oklahoma inheritance tax to the estate of an Indian. In *Oklahoma Tax Commission*,

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[12] Even in these circumstances, such jurisdiction can be precluded by a controlling act of Congress. See *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45 (1962).

Justice Black, writing for the Court, discussed *Worcester* v. *Georgia* and its progeny and stated:

> The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia, supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens . . . . (319 U.S. at 603)

In *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1962), where state jurisdiction over Indians was sustained, there were facts showing that the Southeastern Alaskan Indians lacked the essential treaty-protected internal sovereignty: 1) the Indians had no formal treaty rights and no reservation; 2) Alaska had both civil and criminal jurisdiction over the Indians; and, as stated in the companion case of *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45, 50-51 (1962), 3) these Indians had "substantially adopted and been adopted by the white man's civilization" and were not subject to "the principle of Indian national sovereignty enunciated in *Worcester* v. *Georgia.*"

Neither the Navajo Tribe nor the Montana tribes represented by *amicus curiae* have so abrogated their treaty rights to tribal sovereignty.

C. *Subsequent Acts of Congress Have Not Significantly Modified the Sovereignty Guaranteed to the Navajo and Montana Tribal Indians by Treaty.*

Since the Navajo Indians residing on their reservation have not consented to the Arizona income tax nor have they abandoned or relinquished their treaty-guaranteed

rights of sovereignty in this area, the question remains whether these rights have been modified by act of Congress.

Congress did not modify these rights when Arizona was admitted to the Union. The Arizona Enabling Act[13] provides in part that all lands owned or held by Indians or Indian Tribes "shall be and remain . . . under the absolute jurisdiction and control of the Congress of the United States." In *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 71 (1962), this Court examined identical language in the enabling act for the State of Alaska and interpreted it to mean that federal control, and hence treaty-protected residual Indian rights, were to remain "undiminished" following statehood.

Congress has occasionally employed its plenary power under the Commerce Clause to modify areas of traditional Indian tribal sovereignty and to extend to the states jurisdiction over Indian affairs. But without exception, such legislation has been specific and limited. For example, 25 U.S.C. § 398 represents a rare congressional authorization of state taxation of land or other property within the sphere of tribal government. That statute permitted the states to tax mineral leaseholds on unallotted Indian land, but the grant of jurisdiction was carefully limited to provide that "such tax shall not become a lien or charge of any kind or character against the property of the Indian owner."[14]

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[13] 36 Stat. 557, 569 (1910).

[14] See also 25 U.S.C. § 231, allowing state health inspections and enforcement of compulsory school attendance laws on Indian land, the latter, however, only if the tribe consents; and 18 U.S.C. § 1161, permitting the application on Indian reservations, of state laws dealing with the sale and possession of intoxicants, again, only if there is consent of the tribe.

As a result of this legislative pattern, federal statutes allowing states to assume some form of civil or criminal jurisdiction over Indians have been strictly construed against the states. *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971). In *Kennerly* this Court noted the specificity used when Congress granted to the states civil and criminal jurisdiction over Indians:

> The statute [Section 4 of the Act of August 15, 1953, 67 Stat. 588] is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country. (400 U.S. at 424 n. 1.)

Congress has never expressly or impliedly granted states the power to tax the income of Indians residing on reservations. In fact, it has expressly legislated against the exercise of such authority. The Buck Act,[15] which allowed states to collect sales taxes, use taxes, and income taxes from residents of federal government lands, contains a specific exemption protecting the pre-existing immunity of Indians from all such taxes. The Act provides:

> Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. (4 U.S.C. § 109.)

Thus, Congress has carefully avoided, even by implication, authorizing states to tax the income of reservation Indians.

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[15] 4 U.S.C. §§ 105-110.

D. *The Continuing Viability of Tribal Sovereignty Would Be Severely Jeopardized by State Taxation of the Income of a Tribe or Its Members.*

Indian tribes are "distinct independent political communities,"[16] retaining all of the necessary powers for internal self-government derived from their aboriginal tribal sovereignty. These powers include, of course, the power to tax. *Buster* v. *Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906), upheld a tax imposed by the Creek Tribe on non-Indian reservation traders. Speaking of the Tribe's power to exact such a levy, the Court of Appeals stated:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. . . . [E]very original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek tribe itself. (135 F. at 950)

Just as state civil and criminal laws cannot apply to Indians because the tribes retain the exclusive jurisdiction in such areas derived from their treaty-protected aboriginal rights,[17] state tax laws cannot apply to Indians or Indian

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[16] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[17] *Williams* v. *Lee*, 335 U.S. 214, 218-222 (1959) (civil jurisdiction); *United States* v. *Kagama*, 118 U.S. 375 (1886) (criminal jurisdiction). See also COHEN at 146: "The principle that a state has no criminal jurisdiction over offenses involving Indians committed on an Indian reservation is too well established to require argument,

property subject to sovereign tribal tax powers. In this case, the Navajos have unquestioned civil and criminal jurisdiction on their reservation. Arizona did not undertake such jurisdiction although it might have done so at any time between 1953 and 1968 pursuant to Public Law 280.[18] Nor have the Navajos elected to allow Arizona to assume such jurisdiction under Title IV of the Civil Rights Act of 1968.[19]

The federal government has consistently pursued a policy designed to secure viable self-government for the Indians. Both the Indian Reorganization Act of 1934,[20] and Title IV of the Civil Rights Act of 1968[21] specifically provide for protection and development of the Indians' right to govern their own affairs. Congress has further declared:

> [O]ur national Indian policy shall give full recognition to and be predicated upon the unique relationship that exists between this group of citizens and the Federal Government . . .
>
> . . . [I]mproving the quality and quantity of social and economic development efforts for Indian people and maximizing opportunities for Indian control and self-determination shall be a major goal of our national Indian policy.

Senate Concurrent Resolution 26, December 11, 1971, 117 CONG. REC. 21325-26 (daily ed. Dec. 11, 1971).

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attested as it is by a line of cases that reaches back to the earliest years of the republic. [citations omitted]." See generally, *Id.* at 145-149.

[18] Section 7 of Act of August 15, 1953, 67 Stat. 590, *repealed by* 25 U.S.C. § 1323.

[19] 25 U.S.C. §§ 1321-1322.

[20] 25 U.S.C. §§ 461-479.

[21] 25 U.S.C. §§ 1321-1326.

effective police force and court system which relieves Arizona of significant costs in the administration of justice within its borders. The Tribe also has its own anti-poverty office and welfare programs. Roads on the reservation are maintained by the Tribe and the Bureau of Indian Affairs. State schools which serve Indians are heavily subsidized by the federal government. See Appellant's Jurisdictional Statement, pp. 15-17.

The State of Arizona does not have civil or criminal jurisdiction over the Navajo Indians residing on the reservations within its borders. As this Court noted in *Williams* v. *Lee*, 358 U.S. 217, 223 (1959), Arizona's reason for failing to accept jurisdiction when it could have done so pursuant to Public Law 280,[27] is "possibly because the people of the State anticipate that the burdens accompanying such power might be considerable."

It is submitted that, just as a state may not constitutionally tax a foreign entity to which it furnishes only minimal services, it may not tax sovereign Indian tribes within its borders to whom it furnishes only minimal services without violating due process of law.

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[27] Section 7 of Act of August 15, 1953, 67 Stat. 590, *repealed by*, 25 U.S.C. § 1323.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals as affirmed by the Supreme Court of Arizona should be reversed.

Respectfully submitted,

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